Supreme Court, U. S.
FILED
OCT 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-385

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

THE HONORABLE EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

UNITED NUCLEAR CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO AND THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, COUNTY OF SANTA FE, NEW MEXICO

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Opinions and Orders Below

Petitioner General Atomic Company ("GAC") has failed to set forth completely the operative portions of the preliminary injunction which is the subject of GAC's Petition. The decretal portion of the preliminary injunction is set forth below:

> "IT IS THEREFORE ORDERED that General Atomic Company, its partners, privies, agents, servants and employees, are hereby preliminarily enjoined and

prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, crossclaims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto. However, the case of Gulf Oil Corporation v. United Nuclear Corporation, Civil Cause No. 76-032-B, currently pending in the United States District Court for the District of New Mexico, is excepted from the operation of this preliminary injunction, as is the appeal currently pending before the Tenth Circuit Court of Appeals in General Atomic Co. v. Duke Power Company, et al., No. 76-1152. The injunction herein against defendant shall bind Plaintiff to the same terms."

The order of the New Mexico Supreme Court from which GAC seeks review is set forth below:

> "This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;
>
> "Now, Therefore, It is Ordered by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued."

We agree with GAC that since the New Mexico Supreme Court did not issue a written opinion, its reasons for quashing the writ of prohibition may best be gleaned from comments of the Court and counsel during oral argument. Accordingly, excerpts of that argument are attached hereto as Appendix I.

Jurisdiction

GAC'S FEDERAL CLAIMS WERE NOT CONSIDERED BY THE NEW MEXICO SUPREME COURT AND THE DECISION OF THE SANTA FE COUNTY DISTRICT COURT WAS NOT ONE BY THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD.

No opinion was written by the New Mexico Supreme Court in this action.[1] There is no indication that the New Mexico Supreme Court considered GAC's federal claims. It is at least as likely, probably more likely, that the New Mexico Supreme Court never reached GAC's federal claims, and, in fact, quashed the alternative writ as "improvidently granted" based upon an independent non-federal ground adequate to support its judgment. In New Mexico, prohibition is used sparingly and only where the remedy at law appears inadequate. *See, e.g., State ex rel. State Tax Commission v. Chavez,* 44 N.M. 260, 101 P.2d 389 (1940). An opportunity to appeal is an adequate legal remedy. *Pickering v. Justice of the Peace,* 16 N.M. 37, 113 P. 619 (1911).

In accord with established prohibition concepts, the New Mexico Supreme Court probably dismissed the alternative writ because GAC had failed to pursue its adequate legal remedy — that of interlocutory appeal.

It is plain from the response to the writ of prohibition, the briefs, argument of counsel and remarks of the Court that United Nuclear Corporation's ("UNC") claim that GAC's remedy was by interlocutory appeal, and not prohibition or supervisory control, was presented to and considered by the New Mexico Supreme Court. Attached hereto as Appendix I is an excerpt of the argument of UNC's counsel on this issue.

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[1]The New Mexico Supreme Court rarely writes opinions in original proceedings. During the period July 1, 1975, through June 30, 1976, disposition was made of a total of 62 original proceedings. Only two were disposed of by written opinion. The classification of one of them as an original proceeding is doubtful. Langham v. Beech Aircraft Corporation, 88 N.M. 516, 543 P.2d 484 (1975), concerned a question certified to the New Mexico Supreme Court from the United States Court of Appeals for the Tenth Circuit.

Where both non-federal and federal grounds have been properly raised and no opinion is delivered by the highest state court, this Court presumes that the decision of the highest state court is based upon the non-federal ground. *Durley v. Mayo*, 351 U.S. 277, 281 (1956). GAC's burden of establishing jurisdiction is not met where the New Mexico Supreme Court's judgment *might* have rested upon a non-federal ground. *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). Of course, a ruling by a state court that prohibition is not a proper remedy is an adequate non-federal ground of decision. *Yesler v. Board of Harbor Line Com'rs.*, 146 U.S. 646, 657 (1892).

GAC urges in its Petition, at page 5, that if the New Mexico Supreme Court did not pass on the merits of its claim, then that refusal is equivalent to a refusal to hear a discretionary appeal and therefore the decision of the Santa Fe County District Court was by the "highest Court of a state in which a decision could be had" within the meaning of 28 U.S.C. §1257. Thus, GAC seeks certiorari directed also to the District Court of Santa Fe County.

This proposition urged by GAC shows a fatal misconception of New Mexico's practice and procedure. GAC's proper remedy in the District Court was to seek certification of the injunction question for interlocutory appeal pursuant to §21-10-3, N.M.S.A. 1953 (Supp.1975). This interlocutory appeal procedure is identical, in all material respects, to the federal interlocutory appeal statute, 28 U.S.C. §1292(b). GAC failed to seek this certification for discretionary appellate review.[2] This discretionary review

[2]GAC's failure to seek an interlocutory appeal on the injunction issue is inexplicable in light of the fact that it did apply for and receive the trial court's certification of a question of in personam jurisdiction for interlocutory appeal. UNC did not resist the allowance of the interlocutory appeal on the question of in personam jurisdiction, nor did the trial court hesitate to grant it. UNC would not have resisted the allowance of an interlocutory appeal on the propriety of the injunction. GAC has said it did not seek certification of the appeal because of the delay inherent in the appellate process. However, this argument over the delay overlooks the primary purpose of an interlocutory appeal — the expeditious disposition of interlocutory questions such as we have here.

must be sought; otherwise, the judgment is not one by "the highest court of a state in which a decision could be had." *Cf. Carrono v. Richmond*, 279 F. 2d 170 (2nd Cir. 1960). Only if the state trial judge refused to certify the injunction question for purposes of interlocutory review or if the Supreme Court of New Mexico declined to review the interlocutory injunction question, would the decision of the Santa Fe County District Court have been a decision by the "highest court of a state in which a decision could be had," making possible review by this Court. *Cf. Virginia Ry. Co. v. Mullens*, 271 U.S. 220 (1926). Neither of these circumstances occurred.

Another independent state ground of decision adequate to support the judgment was also urged by respondent UNC and may have been the basis of decision. GAC successfully sought to have the injunction in this action apply to UNC, as well as to it. UNC urged in its brief to the New Mexico Supreme Court that GAC was estopped to challenge the injunction because of the doctrine which forbids parties from assuming inconsistent positions in judicial proceedings (Record: Brief of UNC, Point 5, p. 29).[3] This has been recognized as an adequate non-federal ground of decision. *Leonard v. Vicksburg S. & P. R. Co.*, 198 U.S. 416, 422-423 (1905).

Question Presented

Can a state court in an *in personam* action enjoin a defendant from instituting vexatious, harassing, multiplicitous litigation in the federal courts regarding the subject matter and issues of the pending case?

Constitutional and Statutory Provisions Involved

An additional statutory provision involved is the New Mexico interlocutory appeal statute, §21-10-3, N.M.S.A.

[3]References to "Record" are references to the New Mexico Supreme Court record for General Atomic Company v. Edwin L. Felter (No. 10870).

1953 (Supp. 1975), which provides in pertinent part:

> "A. In any civil action or special statutory proceeding in the district court, when the district judge makes an interlocutory order or decision which does not practically dispose of the merits of the action and he believes the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, he shall so state in writing in the order or decision.
>
> "B. The Supreme Court or court of appeals has jurisdiction over an appeal from such an interlocutory order or decision, as appellate jurisdiction may be vested in these courts. Within ten [10] days after entry of the order or decision, any party aggrieved may file with the clerk of the Supreme Court or court of appeals an application for an order allowing an appeal, accompanied by a copy of the interlocutory order or decision. If an application has not been acted upon within twenty [20] days, it shall be deemed denied."

Statement

Background[4]

This action arises out of a long history of prior dealings between the parties.

UNC has been engaged in the business of mining and milling uranium for the last twenty years. Approximately ten years ago, UNC entered into the business of manufacturing reload fuel assemblies for nuclear reactors. Prior to UNC's entry into this market, the only suppliers of manufactured fuel were the four domestic companies which manufacture nuclear reactors — General Electric, Westinghouse,

[4]This background narrative is taken from UNC's Response To The Alternative Writ of Prohibition. (Record: Response to Writ, pp. 5-8).

Babcock-Wilcox and Combustion Engineering.[5]

UNC was successful in penetrating this nuclear fuel market. Later, substantial delays were encountered in completing construction of nuclear reactors and commencing others. UNC, faced with capital demands from other portions of its business, found it necessary to obtain a partner for the nuclear fuel business who was willing to advance financing.

Gulf Oil Corporation ("Gulf") had previously attempted to break into the nuclear fuel business, but had been unsuccessful in developing the technological proficiency that UNC had already developed and which was required for customer (utility) acceptance. Negotiations between Gulf and UNC led to an agreement dated April 1, 1971, which looked to the formation of a jointly owned corporation known as Gulf United Nuclear Fuels Corporation ("GUNFC") to engage in the light water reactor fuel fabrication business. This agreement made provisions for the ownership, operations, financing and uranium supply for the new corporation.

On June 21, 1971, an agreement entitled the Preincorporation Agreement was entered into by Gulf and UNC and GUNFC was formed pursuant to that agreement.

The business of which UNC divested itself and assigned to GUNFC included, along with its entire fuel fabrication division, executed contracts with two utilities — The Indiana & Michigan Electric Company ("I&M") (contract dated August 18, 1967) and Commonwealth Edison Company ("Commonwealth") (two contracts dated June 10, 1966, and May 25, 1971). Negotiations with Detroit Edison and Duke Power Company had merely reached the letter of intent stage.

[5]For a history of UNC's early activities in this industry, *see* United Nuclear Corporation v. Combustion Engineering, Inc., 302 F. Supp. 539 (E.D. Pa. 1969), and United Nuclear Corp. v. Moki Oil and Rare Metals Co., 364 F.2d 568 (10th Cir. 1966), *cert. denied*, 385 U.S. 960 (1966).

The Duke Power contract was actually executed after UNC sold its interest in GUNFC to Gulf. GUNFC also executed a contract with Detroit Edison in late 1972 which, however, was replaced by a completely new contract in March of 1975 between Detroit and GAC.

Many difficulties arose in the operation of GUNFC. In September of 1973, UNC sold Gulf its interest in GUNFC. The agreement between the parties provided that Gulf indemnified UNC for any claims or causes of action which the utilities might bring against UNC. Simultaneously with the execution of the Dissolution Agreement, Gulf and UNC entered into an agreement, bearing the date of June 30, 1973, called the Supply Agreement for the supply of approximately 25,000,000 pounds of uranium. The Supply Agreement is the subject of the Santa Fe litigation between UNC and GAC.

Following the divestiture of UNC's interest in GUNFC, Gulf operated GUNFC as a wholly owned subsidiary. It alone administered the utility agreements. Subsequently, Gulf merged GUNFC into itself and on January 1, 1974, it transferred the assets and obligations of GUNFC (including the utility contracts) to a partnership called General Atomic Company (the petitioner herein) composed of itself and Scallop Nuclear, Inc., a Royal Dutch/Shell company. (Record: Response to Writ, Ex. 32 at 655, 658).

The New Mexico State Court Action

This action was filed on December 31, 1975, by UNC, seeking to set aside the June 30, 1973, Supply Agreement.[6] The theories upon which UNC bases its claim for relief may be summarized as follows:

(1) Fraud and economic coercion;

(2) Breach of contract and fiduciary obligations;

[6]UNC amended its complaint on April 5, 1976, to add a count involving the rights of the parties concerning a 1974 contract relating to an additional 3,000,000 pounds of uranium.

(3) Violations of the antitrust laws of New Mexico, §§49-1-1, *et seq.*, N.M.S.A. 1953;

(4) Limitation of liability;

(5) Commercial impracticability and force majeure.

This action is a continuation of an action filed on August 11, 1975, by UNC against GAC, Gulf and Scallop Nuclear, the latter two parties being constituent partners of GAC. Gulf removed the entire action, pursuant to 28 U.S.C. §1441(c), to the United States District Court in Albuquerque on the basis that UNC had stated a separate and independent claim against Gulf. UNC voluntarily dismissed that suit and filed the instant action.[7]

On January 15, 1976, GAC obtained an order granting an extension of time within which to answer or file objections to interrogatories propounded by UNC and to answer or

[7]The petitioner correctly points out that UNC first filed a suit in state court which Gulf removed to the United States District Court. While it was pending on UNC's motion to remand, UNC dismissed the first suit and refiled in state court. The petitioner concedes the propriety of UNC having a desire to litigate in New Mexico, but says "that does not explain why UNC took a non-suit and dropped a party in order to prevent removal to the Federal District Court in New Mexico." If an explanation is owing, it is easily made. The first suit was against GAC, but also named its constituent partners, Gulf and Scallop, in that capacity. They were named for no other reason, and no independent cause of action was intended to be stated against Gulf. Whatever ruling the U.S. District Court might have made on UNC's motion to remand, because of the jurisdictional question arising from a lack of diversity between Scallop and UNC, an interlocutory appeal (a possibility suggested by the court) would have been essential, involving at best long delay and at worst commencing anew in state court. *See* American Fire and Casualty v. Finn, 341 U.S. 6 (1951). UNC took the obvious course of dismissing that action and refiling in state court without naming Gulf and Scallop as parties. Inferences and criticism of UNC for a decision to litigate in a court which has jurisdiction, contrasted to litigating in one which may not, seems unwarranted. No one has said that the federal district court had jurisdiction of the first action except counsel for GAC and Gulf. Certainly, the court never so ruled.

otherwise plead to the complaint. (Record: Response to Alternative Writ, p. 2). Counsel for UNC learned at the chambers conference held by the trial judge on GAC's request for an extension of time that GAC intended to file a suit in another jurisdiction concerning the subject matter of this action.

On January 19, 1976, UNC filed an application for a temporary restraining order and preliminary injunction seeking to prohibit GAC from filing any suit in another forum concerning the subject matter of this action. The court ordered that opposing counsel be notified and given an opportunity to object to the application for a temporary restraining order. Opposing counsel were notified and appeared in opposition to the application. The application was denied. (Record: Response to Alternative Writ, p. 3).

GAC, while the application was being heard, filed a statutory interpleader action in the United States District Court for New Mexico naming UNC and the four utilities as defendants. (Record: Response to Alternative Writ, p. 3). One day later, January 20, 1976, Gulf also filed a suit in the

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[7](cont.)

GAC also makes statements relating to the resignation of Justice Stephenson from the New Mexico Supreme Court to rejoin the law firm with which he had previously been associated for many years. This statement is made for the purpose of having this Court erroneously infer that GAC cannot obtain fair and impartial decisions from the New Mexico state courts. GAC denied any such implication before Judge Frankel of the United States District Court for the Southern District of New York. In that action, GAC's attorney made a statement comparable to the one contained in the footnote on p. 9 of the Petition but explained his statement as follows: "I am not making any suggestion at all that Justice Stephenson was sitting on the Supreme Court of New Mexico at the time some of the proceedings were before this court, or had anything to do with that proceeding. I am not suggesting he acted in any way improperly while he was on the court.*** I say that with the greatest of respect for the New Mexico state court system and in particular Judge Felter." (See Appendix II attached hereto.)

GAC introduced these statements in evidence in the trial court and in open court reaffirmed that they had intended no aspersions against anyone. We believe GAC should be censured for trying to inject an inference they know to be false in this Petition.

United States District Court for the District of New Mexico against UNC, the issues of which concerned the subject matter of the Santa Fe County action. (Record: Response to Alternative Writ, p. 3).

On February 25, 1976, GAC moved to dismiss this action on the grounds that the court lacked personal jurisdiction over GAC. Thereafter, on March 9, 1976, GAC filed a second and separate motion to compel joinder or to dismiss this action on the ground that UNC had failed to join parties (the utilities) necessary for a just adjudication under Rule 19. (Record: Response to Alternative Writ, p. 3).

On March 15, 1976, UNC filed a second application for a temporary restraining order and preliminary injunction. UNC believed that GAC or its partners intended to file a third party complaint against UNC in a case brought by the Indiana & Michigan Electric Company ("I&M") against GAC, Gulf and Scallop Nuclear in the United States District Court for the Southern District of New York, as well as additional actions. The District Court granted UNC's *ex parte* application for a temporary restraining order and set the preliminary injunction down for hearing. (Record: Response to Alternative Writ, pp. 3, 4).

GAC, in its response to the application for injunction, admitted its intention to join UNC in an arbitration action between Duke Power and GAC and in any actions or arbitration proceedings between GAC and any of the utilities. (Record: Response to Alternative Writ, pp. 3, 4).

The District Court thereafter, following a hearing, presentation of documentary evidence and submission of briefs, ruled that a preliminary injunction should be granted restraining GAC, its partners, privies, agents, servants and employees, from instituting any kind of legal proceedings relating to the subject of the Santa Fe action against UNC in a jurisdiction other than the District Court of Santa Fe County. (Record: Response to Alternative Writ, pp. 3, 4).

After the District Court announced its ruling in a letter granting the preliminary injunction, a hearing was held in the trial judge's chambers regarding the form of the preliminary injunction. At that hearing, counsel for GAC sought and obtained an injunction against UNC binding UNC to the same injunction terms that ran against GAC. (Record: Response to Alternative Writ, pp. 3, 4).

The District Court found that its jurisdiction had attached prior to the institution of actions in any other forum relating to the subject matter of the instant suit. It found that in the interest of orderly procedure, the parties to this suit should have their rights, duties and liabilities determined in this forum. It found that UNC would be irreparably injured and would have no adequate remedy at law should the preliminary injunction not be granted. Finally, the court found that the institution or prosecution of other legal proceedings[8] by any of the parties to this action would be vexatious, harassing, multiplicitous litigation, contrary to the speedy and orderly administration of justice. This finding of vexation was unchallenged by GAC in its prohibition action and should not be reexamined by this court. *Grayson v. Harris*, 267 U.S. 352, 358 (1925). (Record: Response to Alternative Writ, p. 5).

At the same time the court granted the preliminary injunction, it also denied both of GAC's motions to dismiss. However, an interlocutory appeal was certified by the District Court on the issue of personal jurisdiction, at the request of GAC. GAC did not request that it be granted an interlocutory appeal from the injunction. (Record: Response to Alternative Writ, p. 5).

The Various Lawsuits

1. THE ILLINOIS STATE COURT ACTION

The first of many lawsuits filed by GAC relating to its

[8]The two pending federal cases, GAC v. Duke Power, *et al.*, No. 76-029-B (D.N.M.) and Gulf v. UNC, No. 76-032-B (D.N.M.), were excepted from the injunction.

disputes with UNC and the utilities was instituted by it in the Circuit Court of La Salle County, Illinois, against Commonwealth Edison Company, Cause No. 74 L 965, alleging that GAC did not have to perform the contract it inherited from UNC. The complaint alleged that the contract was terminated pursuant to a cancellation provision and that performance was commercially impracticable. The state court ordered the parties to arbitrate and that decision is now on appeal to the Illinois Supreme Court. This case refutes GAC's contention that it will be hopelessly prejudiced if UNC is not joined in actions between GAC and the utilities. Here GAC failed to consult, notify, or even name UNC as a party.

2. THE ILLINOIS FEDERAL COURT CASE

On January 15, 1975, Commonwealth Edison filed suit in the United States District Court in Chicago against GAC, Gulf, Scallop and UNC, Cause No. 75-C-153, seeking to force the defendants to arbitrate Commonwealth's dispute with GAC. Arbitration was ordered by the District Court and its order was recently affirmed by the U.S. Court of Appeals for the Seventh Circuit.[9]

3. THE NEW MEXICO FEDERAL INTERPLEADER

At exactly the same time the trial court denied UNC's first application for a temporary restraining order, GAC filed an interpleader action, on January 17, 1976, pursuant to 28 U.S.C. §1335, in the United States District Court for the District of New Mexico, No. 76-029-B, against UNC and the utilities. This interpleader was dismissed for lack of subject matter jurisdiction because, as the District Court stated, "plaintiff [GAC] is not a party that is or may be subjected to conflicting claims by two or more defendants growing out of a single obligation of the plaintiff." (Record: Response to Writ, Ex. 41, p. 746, Order of Dismissal in Interpleader Action, No. 76 029-B (D.N.M.)). The District Judge recognized that GAC's obligations to each utility are separate and distinct

[9]Commonwealth Edison v. Gulf, Nos. 75-2146, 75-2147 and 75-2148 (7th Cir., September 20, 1976).

from any rights and obligations between GAC and UNC. This case is currently on appeal to the United States Court of Appeals for the Tenth Circuit, No. 76-1152. This case was specifically excepted from the operation of the injunction.

4. The Gulf Case

On January 20, 1976, the day after UNC's first attempt to obtain a temporary restraining order and the day after GAC filed the interpleader, Gulf, one of GAC's constituent partners, filed a suit for declaratory judgment against UNC in the United States District Court for the District of New Mexico, No. 73-032-B, seeking to obtain a declaration that a purported release contained in the September 12, 1973, Dissolution Agreement was valid and enforceable and barred UNC's claims against GAC. This case was dismissed on UNC's motion on September 29, 1976, the Court declining to take jurisdiction of the action because the rendering of declaratory relief would not resolve all issues between the parties, while a decision in the Santa Fe action would afford complete relief.

5. The New York Case

On February 24, 1976, I&M instituted suit against GAC in the Southern District of New York, No. 76 Civ. 881 (MEF), seeking specific performance of its contract with GAC to supply uranium and fabricated nuclear fuel. GAC moved to dismiss the action for failure to join UNC as a party needed for a just adjudication under Rule 19, Fed.R.Civ.P. In his opinion (attached hereto as Appendix III) denying the motion, Judge Frankel, quoting from I&M's brief, stated:

> "The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them (to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M) UNC

> must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract."

6. The Duke Arbitration

On February 17, 1976, Duke Power Company filed a demand for arbitration against GAC seeking specific performance or damages occasioned by GAC's failure to perform its contract with Duke Power. GAC resisted that demand by filing the suit detailed below.

7. The Duke Power Case

On May 28, 1976, GAC filed suit in the United States District Court in Charlotte, North Carolina, against Duke Power Company, No. C-C-76-17E, seeking to stay arbitration proceedings previously demanded by Duke Power and to obtain a declaration of its rights and obligations under its contract with Duke. One of the reasons GAC advanced to support a stay of arbitration was the absence of UNC from the arbitration. In ordering the parties to arbitration (Appendix IV attached hereto), the District Judge said:

> "As to the request for a delay because United Nuclear Corporation is not a party defendant, two points should be noted:
>
> (a) United Nuclear, as a guarantor[10] only of the 1973 contract in suit, would not be an improper party, but it is certainly not a necessary party to a determination of the rights of General Atomic and Duke under the arbitration agreement.
>
> (b) A state court in New Mexico has entered an order, binding upon General Atomic, the plaintiff herein, enjoining plaintiff from litigating in any other court, or arbitrating, its claims against United

[10] UNC disputes that it has guaranteed the Duke contract or any of the utility contracts. The Duke contract was executed after UNC had sold its interest to GUNFC.

Nuclear pending decision by the New Mexico state court. Despite that court order, General Atomic suggests that the court should bring United Nuclear into the arbitration proceedings on its own motion, and in any event should not permit arbitration of Duke's claim until United Nuclear has been brought into the arbitration proceedings. The one would be a violation of the letter and the other the spirit of the New Mexico court order. Moreover, I am unwilling to accept the suggestion that the New Mexico courts will not give General Atomic a fair hearing because United Nuclear, apparently a publicly held corporation, digs uranium in New Mexico. This court must and will proceed upon the premise that the New Mexico court will decide the case on its merits without regard to where the uranium is dug."

8. The I&M New Mexico Case

On August 22, 1975, UNC filed suit against I&M and American Electric Power Service Corporation in district court in McKinley County, New Mexico, seeking a quiet title to certain of UNC's uranium ore reserves. The 1967 contract with I&M, now held by GAC, is unique in that certain of UNC's ore reserves are dedicated to I&M. I&M removed this case to federal district court in New Mexico where it is now subject to an indefinite stay of proceedings. GAC has recently sought to intervene in this action.

In addition to having federal judges in three federal courts reject its claim that UNC was a necessary or indispensable party in its litigation with the utilities, or that its obligations to the utilities were dependent on performance by UNC of its contract with GAC, the converse of that argument has been rejected by the New Mexico state courts. GAC moved to dismiss the Santa Fe action for failure to join the utilities as indispensable parties. This attempt was rejected by the Santa Fe County District Court as well as by the New Mexico Supreme Court in GAC's prohibition action.

Reasons For Not Granting The Writ

The thrust of this Petition is based upon GAC's contention that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), deprives a state court of the opportunity to protect is jurisdiction and prevent misuse of the judicial system by enjoining, except for pending federal actions, a party from instituting further piecemeal, vexatious, harassing litigation in the federal courts. There is apparently no dispute over the power of a state court to enjoin parties before it from instituting vexatious litigation other than in federal courts. *Poole v. Mississippi Publishers Corp.*, 44 So.2d 467 (Miss. 1950); Annot. 6 A.L.R.2d 896 (1949). UNC submits that there is nothing in *Donovan*, its progeny,[11] or the Constitution which prohibits the injunction issued here.

GAC's entire argument is predicated upon the proposition that UNC is obligated to the utilities to furnish them with uranium and thus GAC will be irreparably injured if GAC is not allowed to join UNC and the utilities in the same action. This theory, endlessly intoned and invariably rejected, forms the basis for GAC's complaint that it has been hopelessly prejudiced and deprived of its constitutional rights by the injunction. No court, federal or state, to which this issue has been presented, either directly or tangentially, has ever given it credence. Each rebuff, rather than demonstrating to GAC the final resolution of the argument, seems to merely inspire GAC to file more lawsuits upon this same question.

An examination of the facts which underlie the legal relationships of UNC, GAC and the utilities demonstrates the fallacy of GAC's contention concerning UNC's fancied obligations to the utilities.

UNC did not execute, nor was it a party to, all of the contracts referred to by GAC in its petition. Some of them

[11] On page 19 of its Petition, GAC cites certain federal and state cases as upholding its construction of *Donovan*. Suffice it to say that none of these cited cases bears the remotest resemblance to the factual or legal situation presented by the instant case.

were executed by UNC, but others represented mere negotiations evidenced by letters of intent. Whatever these rights and obligations may have been, they were all assigned, with the approval of the utilities, to GUNFC and subsequently to GAC.

The uranium supply agreement of June 30, 1973, which is the subject of the UNC-GAC dispute, requires, if it is valid, that UNC furnish certain uranium to GUNFC, or to GAC, its successor, not to the utilities which were not parties to that contract. It is the validity of this contract and the nature and extent of the rights and obligations of the parties thereto (UNC and GAC) which form the principal issues in the Santa Fe County litigation.

Thus, as matters stand, GAC is obligated to the utilities for performance of their contracts which, incidentally, do not involve the mere furnishing of component uranium, but also fuel fabrication manufacturing and services. UNC's obligations, if any, are to GAC. That this was the understanding of the parties is aptly illustrated by the fact that Gulf has indemnified UNC from liability for any claims which might be asserted against it by the utilities. (Record: Ex. 7 to First Amended Complaint; p. 176 of Exhibits to Response to Alternative Writ, Vol. 1).

The issuance and enforcement of the injunction does not in any manner conflict with this Court's decision in *Donovan v. City of Dallas*, 377 U.S. 408 (1964). The unchallenged finding of fact by the trial court relating to GAC's propensity for multiplicitous litigation makes clear the necessity of the injunction. This finding of fact, coupled with the trial court's clear adherence to the *Donovan* decision,[12] shows that the Petition for Certiorari is baseless.

[12]The trial court excepted two pending federal actions where jurisdiction had been obtained over UNC, but enjoined the attempted joinder of UNC in additional state, federal or arbitration action where jurisdiction had not yet attached over UNC.

The preliminary injunction contains the following finding of fact:

> "5. The institution or prosecution of other legal proceedings by any of the parties to this action, or their privies, would be vexatious and harassing and would be multiplicitous litigation, all of which is contrary to the speedy and orderly administration of justice." (Record: Preliminary Injunction).

The trial court made this finding only after it denied UNC's first application for a temporary restraining order. After the trial judge denied UNC's first application, GAC thereupon filed the federal interpleader and caused its constituent partner Gulf to file an overlapping declaratory judgment action against UNC in federal court. Thereafter, upon a showing that GAC intended to join UNC in still other actions and arbitrations in distant jurisdictions, and after a decision that the utilities need not be joined, the injunction was issued, excepting from its scope the two New Mexico federal actions filed by GAC and Gulf. A comparable ruling regarding the joinder of GAC, UNC and the utilities had previously been made in the federal interpleader. The trial court's decision regarding the joinder of the utilities was reviewed by the New Mexico Supreme Court in GAC's prohibition action and rejected. It has not been reasserted in this Petition. GAC's motions to determine that UNC is an indispensable party in actions with the utilities have likewise been rejected by federal judges in New York and North Carolina.

GAC's Petition to this court attempts to portray the New Mexico courts as being ignorant of the dictates of *Donovan*. The issue decided by this Court in *Donovan* was narrowly framed:

> "The question presented here is whether a state court can validly enjoin a person from prosecuting an action *in personam* in a District or Appellate court of the United States which has jurisdiction both of the parties and of the subject matter." 377 U.S. at 408.

The narrow question presented by *Donovan* grew out of an equally narrow grant of certiorari in which this Court stated:

> "We declined to grant certiorari to review the United States District Court's dismissal of the case before it or its dismissal of the appeal brought on by the state court's coercive contempt judgment, but we did grant certiorari to review the State Supreme Court's judgment directing the Civil Court of Appeals to enjoin petitioners from prosecuting their action in the federal courts and also granted certiorari to review the Civil Court of Appeals judgment of conviction for contempt." 377 U.S. at 411.

The two statements quoted above provide the linchpin of the *Donovan* decision. The broad prohibition against state court injunctions which GAC believes is contained in *Donovan* has no basis either in the facts of that case or in this Court's opinion.

This Court held in *Donovan* that even where a party has prevailed in a case which has been decided by the highest court of a state, that party cannot have a state court enjoin the relitigation of the same questions presented in a federal court after jurisdiction has attached in the federal court. The parties' remedy in such a situation is to plead the state court judgment as res judicata in the federal action. The federal court is then able to dispose of the case based upon the "full faith and credit" clause of the Constitution and the principle of res judicata. This procedure is consistent with the principle that state and federal courts possess concurrent jurisdiction in in personam actions and also enforces the *Donovan* rule that:

> "***where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.***" 377 U.S. at 413.

As UNC's Statement of the Case shows, the trial judge issued his injunction in this case based upon an entirely

different set of facts and equitable considerations than those present in *Donovan*. UNC was faced with litigation of the same issues in both state and federal courts in New Mexico. UNC was faced further with the threat of the institution of additional actions by GAC relating to identical issues contained in the Santa Fe action in various state and federal courts throughout the nation. This was not merely a threat of relitigation of an action in federal court which had already been previously decided in the courts of a state. Rather, GAC was actively attempting to use arbitration proceedings and the state and federal courts for the purpose of piecemealing the Santa Fe County case and to force UNC to participate in multiplicitous litigation, thereby restricting UNC's ability to protect its rights. It was this actual and threatened abuse of the use of the courts which the trial judge found to be vexatious and harassing. If anyone is faced with inconsistent judgments, it is UNC by being forced to litigate the same issues in five or six different forums.

UNC's adversary in this litigation, and the only true one it has, is GAC, a partnership comprised of Gulf Oil Corporation and Scallop Nuclear, Inc., a Royal Dutch/Shell company. Gulf and Royal Dutch/Shell are old and established multinational oil companies. They are usually counted among the ten largest corporations in the world. Their resources are combined in GAC. Singly or in concert, they have adopted and energetically pursued a plan of piecemeal litigation on a coast-to-coast basis in an effort to prevent the actual controversy which pends between GAC and UNC being litigated in a single lawsuit. By prostituting the orderly processes of the judicial system, they seek to bring their economic power to bear to preclude an orderly resolution of the only controversy which exists. The finding in the preliminary injunction to the effect that GAC will, unless restrained, file additional actions against UNC which would be vexatious, harassing and multiplicitous is richly justified. GAC is using its tactics of multiplicitous litigation in its continuing effort to obtain control over UNC's uranium reserves. The law recognizes that oppressive litigation is one of the most potent weapons in the arsenal of the corporate predator. *See* Givens, *Litigation as a Means of Economic*

Competition, 27 RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 572 (1972); Blecher and Bennet, *Litigation as an Integral Part of a Scheme to Create or Maintain an Illegal Monopoly,* 26 MERCER L.REV. 479 (1974). To hold that no court could protect its jurisdiction under such circumstances would have the effect of permitting industrial giants, such as Gulf and Royal Dutch/Shell to bring their unlimited resources to bear upon UNC so as to deny UNC the right and opportunity to have its day in any court.

Within this framework other issues than those proposed by GAC come to the fore. These include: 1) How many lawsuits does GAC have a constitutional right to assert against UNC? 2) Should GAC be permitted to pursue a program found by the trial court to constitute harassment through the filing of vexatious and multiplicitous litigation? 3) Is it possible for a civil litigant of limited resources to bring its case to trial when opposed by an array of economic might which has embarked upon a program of oppressive piecemeal litigation? To pose these questions is to answer them.

In *Donovan*, the Court did not consider the question of whether a state court could enjoin the *institution*, as opposed to the *prosecution*, of an action in the federal court. The majority opinion stated the issue in *Donovan* as follows:

> "The question presented here is whether a state court can validly enjoin a person from *prosecuting* an action *in personam* in a district or appellate court of the United States *which has jurisdiction both of the parties and of the subject matter.*" 377 U.S. at 408 (emphasis added).

At the time the injunction was granted, there were no pending federal actions between GAC and UNC encompassed within the scope of the injunction. Two cases were pending in federal courts to which UNC is a party — *General Atomic Company v. Duke Power, et al.*, No. 76-029-B (D.N.M.), and *Gulf Oil Corporation v. United Nuclear Corporation,* No. 76-032-B (D.N.M.). The trial judge, recognizing the command of *Donovan,* judiciously avoided including the above causes then pending in federal courts in

his injunction. He recognized that while the filing of these actions partially formed the basis for his finding of vexatious and harassing litigation, he was without power to enjoin their prosecution under this Court's holding in *Donovan.*

If, in *Donovan,* the state court had excepted the one pending federal action (as the injunction here excepts two pending federal actions), and if a plan of further vexatious, harassing litigation had been shown and enjoined, a completely different issue would have been presented. That situation is the one presented by this case but was not presented in *Donovan.*

Donovan and other authorities have long recognized the distinction between prohibiting the *institution* of suits and injunctions against the *prosecution* of suits already pending. State-federal antisuit injunctions present troublesome problems of comity where in personam proceedings are involved because of the danger of reciprocal injunctions which may leave the parties without a remedy. For this reason, a state court does not have jurisdiction to enjoin proceedings in a federal court once jurisdiction has attached in the federal forum. *Donovan v. City of Dallas, supra; Blanchard v. Commonwealth Oil Company,* 294 F.2d 834 (5th Cir. 1961). The prohibition against state-federal antisuit injunctions has not been directed against the future institution of proceedings in federal court and the authorities have maintained this distinction. See *Lyons v. Importers and Traders National Bank,* 63 A. 827 (Pa. 1906) (distinguishing case where suit in federal court had not yet been commenced), and *Wheeler v. Vimalert Co.,* 235 App.Div. 643, 255 N.Y.S. 114 (Sup. Ct. 1932) (distinguishing injunctions prohibiting the institution of further suits).

In a parallel situation to that faced by state courts, federal courts are barred by statute from restraining or enjoining *pending* litigation in state courts. 28 U.S.C. §2283 provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where

necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The federal cases uniformly hold that the federal anti-injunction statute, 28 U.S.C. §2283, does not apply to state proceedings which have not yet commenced, thus recognizing the distinction between enjoining the *institution* of actions as opposed to enjoining the *prosecution* of pending litigation. *Scott v. Hunt Oil Co.*, 398 F.2d 810 (5th Cir. 1968). For example, in the recent case of *Barancik v. Investors Funding Corporation of New York*, 489 F.2d 933 (7th Cir. 1973), the court noted with respect to the federal anti-injunction statute that the timing of a litigant's resort to the state court is significant. Holding that the applicability of 28 U.S.C. §2283 must be determined as of the time of the federal court's injunction, the Court stated:

"[T]iming may affect the exercise of a federal judge's discretion; it may also affect his power." 489 F.2d at 936.

See also Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965) (threatened criminal prosecution); *Scott v. Hunt Oil Co., supra; Walter E. Heller & Company, Inc. v. Cox*, 379 F.Supp. 299, 309 (S.D.N.Y. 1974) (threatened civil proceedings); *McQueen v. Druker*, 317 F.Supp. 1122, 1133 (D.Mass. 1970) (landlord and tenant).

The authority upon which GAC relies so heavily, *Donovan v. City of Dallas, supra*, makes clear that the New York I&M action does not come within the proscription of the *Donovan* rule. UNC had not been joined in the New York I&M action when the injunction was issued. In the words of Justice Black in *Donovan*, "jurisdiction had not yet attached" over UNC in that New York action.

The prohibition against a state court enjoining a party from instituting federal proceedings applies only where the federal court already:

"*. . . has jurisdiction both of the parties and of the subject matter.*" *Donovan v. City of Dallas*, 377 U.S. at 408 (emphasis added).

Federal actions pending against UNC at the time of the injunction were excepted from the injunction. In *Donovan* the defendants were enjoined from prosecuting a pending federal action wherein the federal court had obtained jurisdiction of the cause and of the parties.

It seems clear from a reading of *Donovan* that the concerns motivating the majority were the interference by a state court with an ongoing federal action which had jurisdiction of the cause and all parties and the availability of an expeditious, economical and adequate legal remedy to the federal defendants — that of pleading the bar of res judicata. Here, both concerns are totally absent. There were no federal actions, within the scope of the injunction, pending against UNC at the time of issuance. Thus, the *Donovan* feature of state interference in ongoing federal proceedings is lacking in this case. Likewise absent is the presence of an expeditious or adequate legal remedy for UNC. It gives UNC little comfort to hear suggestions that two of the largest corporations in the world can force UNC to travel hither and yon to litigate in forums in which is has no interest, over issues which do not concern it, with parties with whom it has no quarrel.

In its Petition, GAC claims that it has been denied the opportunity to raise defenses and make claims. This is clearly not an accurate statement of the position in which GAC has placed itself. GAC has had and continues to have opportunities to assert all claims and defenses available to it in multiplicitous suits already pending and not enjoined before various federal and state courts where jurisdiction has been obtained over UNC.

GAC argues that impleader, under Rule 14, Fed. R. Civ. P., is guaranteed to it and that the injunction "unconstitutionally" denies it that "right." However, it is clear that impleader has never been elevated to such a constitutionally guaranteed status. As Professor Moore states:

"Impleader is permissive and not compulsory. An original party may, but is not obliged to implead a third party, and his failure to do so, or the court's refusal to

permit him to do so, affects none of his substantive rights." 3 MOORE'S FEDERAL PRACTICE ¶14.06 at 14-201 (1974).

Equally inaccurate is GAC's claim that it is denied some defense by this injunction. GAC argues that its "ultimate defense" is that if it is liable to a utility, then UNC is liable to GAC. Such may be GAC's ultimate theory of liability, but it is not a defense to actions brought by the utilities. It is no defense to a suit on a contract to assert that a third party has failed to supply goods to the defaulting supplier.

GAC has made this or substantially similar arguments to many courts and those courts have uniformly rejected the claims. In the state court action in which this injunction was issued, GAC claimed that the utilities were indispensable parties. That claim was rejected by both the trial court and the Supreme Court of New Mexico. In *General Atomic Company v. Duke Power Company*, No. C-C-76-173 (W.D.N.C.), the federal district court found that UNC was not an indispensable party to the arbitration between GAC and Duke. GAC was not denied any defenses by that court's action. In *Indiana & Michigan Electric Company v. GAC* No. 76 Civ. 881 (S.D.N.Y.), GAC moved to dismiss for lack of indispensable parties and the federal district court also rejected that claim. In the United States District Court for the District of New Mexico, GAC brought an action in interpleader seeking to have all the utilities and UNC involved in one action. That court found, in effect, that UNC and the utilities were not making a claim to a common fund or *res* and that the various contractual obligations and rights of UNC, GAC and the utilities were not so interdependent as to make interpleader proper.

In view of the repeated rulings by these courts, where trials on the merits and final judgments have not yet occurred, that it is not necessary to join the utilities in litigation with UNC, or vice versa, it is apparent that GAC is the only participant in any proceeding who does not understand the nature of third party practice. UNC, as a party to a supply agreement with GAC, is not an indispensable or necessary party to

GAC's litigation with any utility, nor are the procedural provisions of Rule 14 in the nature of a defense. Neither does the inability of GAC to implead UNC deprive GAC of any "rights."

GAC now argues that it is not attempting to subject UNC to vexatious, multiplicitous litigation, but is merely seeking a "unitary determination" of all relevant issues. These statements are at variance with the facts. What GAC is truly seeking is to force UNC into piecemealing its litigation with GAC into various suits around the country. There is absolutely no reason that UNC, seeking a resolution of a dispute with GAC over one contract, should be required to defend five or six different lawsuits to litigate, in each instance, only a portion of its dispute with GAC and involving many issues between GAC and the utilities which are not material to UNC's action.

We have asserted that GAC's statements and explanation of the legal and factual background which underlie this case are incomplete and inaccurate. We could not let them pass unchallenged but nevertheless recognize, and assert, that the writs of certiorari sought do not encompass these underlying issues and that they are not determinative of the issues to be decided here. Neither are GAC's motives for causing multiplicitous litigation at issue here. Those motives were established as "vexatious and harassing" by the trial court's finding.

As to GAC's assertion that it has been denied the right to defend, a review of the proceedings now pending is enlightening. In the state court action in which this injunction was issued, GAC has filed a counterclaim in the total sum of over two billion dollars.

GAC filed a complaint in interpleader in the United States District Court for the District of New Mexico which stated GAC's claims against UNC and the utilities. GAC is currently pursuing an appeal of the court's dismissal of that action.

One of GAC's constituent partners (Gulf) filed a declaratory judgment action against UNC in the United States District Court for the District of New Mexico which stated claims against UNC material to the Supply Agreement. This cause was dismissed because of the pending action in the New Mexico state court. Whether GAC will appeal is not known. GAC has filed a motion to intervene in a suit now pending between I&M and UNC in the United States District Court for the District of New Mexico. Proceedings in this action are stayed. GAC cannot seriously contend in the face of three federal actions and one state action that it has been denied any opportunity to make claims against UNC.

GAC, by this injunction, has been prevented from instituting vexatious and harassing litigation in its efforts to piecemeal the determination of the validity of the UNC-GAC Supply Agreement. GAC can raise any claim or defense against any utility or UNC in actions now pending. It should not now be heard to complain that it is enjoined from abusing the judicial system. Likewise, the utilities, if they feel they have a claim against UNC, are free to advance them in any forum. Nothing in the Constitution or in notions of federal supremacy prevents a state court from preventing a party subject to its jurisdiction from abusing the right of access to the courts.

Conclusion

Based upon the foregoing, we respectfully submit that the Petition for Writs of Certiorari should be denied.

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October 15, 1976

APPENDICES

APPENDIX I

A-1

Order of The Supreme Court of New Mexico

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

Wednesday, June 16, 1976

No. 10870

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Petitioner,

vs.

HON. EDWIN L. FELTER, District Court Judge for the First Judicial District, Santa Fe County, New Mexico,

Respondent.

This matter coming on for consideration by the Court upon petition for alternative writ of prohibition or alternative writ of superintending control, and the Court having issued said Writ and having heard oral argument and now being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED by the Court that the alternative writ heretofore issued in the above entitled cause on the 14th day of April, 1976, be and the same is hereby quashed as having been improvidently issued.

Attest: A true Copy
ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * * * *

JUSTICE MONTOYA: Now that bothers me insofar as the writ of prohibition is concerned, whether prohibition is a proper remedy under the circumstances here. The judges are already asking of me, "How can we prohibit it now?"

MR. ROBB: Well, I think from a technical standpoint the question of prohibition or whether the court acts under a superintending writ of control, I think probably it more largely follows in that latter category, Mr. Justice.

JUSTICE MONTOYA: It couldn't follow under the writ of prohibition.

MR. ROBB: Yes, I think there is a problem with prohibition because what we are saying here is — we are not saying the court lacks jurisdiction to do this, we are saying it shouldn't have done it, that it was improper for it to have done so.

JUSTICE MONTOYA: Isn't the proper remedy then appeal?

* * * * *

MR. BIGBEE: Coming again now to the next question. I think — they say they didn't appeal these injunctions because Judge Felter didn't certify them. They forget to say they didn't ask him to. You've got the record in the other appeal already before you. And, again, they never do anything just once. Like when we filed our first suit, they don't file just one case against us, they file two. So when they decide to go to the appellate procedure, we don't have one proceeding, we have two. There's an appeal where every one of these questions could have been certified by Judge Felter.

Excerpts from tape recording of hearing on June 16, 1976, in Santa Fe, New Mexico, before the Supreme Court of the State of New Mexico, Justice Oman, Justice Montoya and Justice Sosa sitting for the court.

* * * * *

They asked for one. I said no objection. They didn't ask for these others. They say that probably they wouldn't have been entitled to an interlocutory appeal and they say this in their reply brief. Why? Because it would not expedite the determination of the merits. That what on earth are we doing here by prohibition? I've got two things going. Now let's get to the merits of this case to see about this party situation. It's [inaudible]. It should be by appeal. It's terrible. We had to put these three volumes together and we still didn't get you the complete record in the short time. Because this is a matter that Judge Felter is entitled to have his record before you when it says he erred. But we tried to get enough in here.

* * * * *

MR. BIGBEE (Continuing): We respectfully submit they should have proceeded by appeal in every phase here. It is ridiculous to be before this Court with two large voluminous records; probably neither are quite as complete as they should be. We had to duplicate most of it. There was no reluctance; if they could have asked for a certification and been turned down, they could have said so. But Judge Felter was perfectly willing to let them certify any of these preliminary questions and the record shows we made no objection. And we're up here on a record that it's hard for this Court to make heads or tails of, and we're to have another one. But they always do it in twos, Your Honors.

* * * * *

APPENDIX II

A-4

Excerpts from transcript of hearing on September 8, 1976, in New York, New York, before Hon. Marvin E. Frankel, United States District Judge for the Southern District of New York, in the case of Indiana & Michigan Electric Co. v. Gulf Oil Corp., et al., 76 Civ. 881 (MEF)

* * * * *

MR. HUPPER (Representing General Atomic and Gulf Oil Corporation): Your Honor, if I may before I leave that point I am not making any suggestion at all that Justice Stephenson was sitting on the Supreme Court of New Mexico at the time some of the proceedings were before that court, or had anything to do with that proceedings. I am not suggesting that he acted in any way improperly while was on the court.

* * * * *

MR. HUPPER (continuing): I say that with the greatest of respect for the New Mexico state court system and in particular for Judge Felter.

APPENDIX III

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDIANA & MICHIGAN ELECTRIC COMPANY, *Plaintiff,*		76 Civ. 881 (MEF)
—against—		
GULF OIL CORPORATION and SCALLOP NUCLEAR, INC., co-partners doing business under the name and style of General Atomic Company, and GULF OIL CORPORATION, individually, *Defendants.*		

FRANKEL, D. J.

Invoking "the pragmatic dictates of Rule 19(b), Fed. R. Civ. P.", *Federal Resources Corp. v. Shoni Uranium Corp.*, 408 F.2d 875, 876 (10th Cir. 1969), and citing the source of the quoted phrase as prime authority, defendant moves to dismiss the complaint for failure to join an assertedly indispensable party. The motion has been ably briefed and argued on both sides. The court concludes that dismissal is not warranted.

1. Defendant says "[t]he first test in 19(a) is * * * clearly met." The court disagrees. Whether defendant wins or loses, a complete and final decision here does not "require" in any pertinent sense further litigation with UNC. Of course, should defendant lose and be required to perform, it will have a substantial interest in seeking performance from UNC. However, such an interest does not constitute *legal* necessity, only the economic necessity a vendor may always have to obtain from its own suppliers what they have assertedly promised.

2. Plaintiff's analogy to the standard supplier situation is the apt one. The issues between UNC and GAC are substantially different from the ones here. There is, to be sure, a possibility of inconsistent adjudications. But that is an unlikely prospect, insufficient to overcome the right of plaintiff to seek enforcement here of defendant's asserted obligations. Defendant's [sic] Reply Memorandum highlights the distinct and separable nature of the controversies among the parties when it says (p. 17):

> "The central substantive issue in this case is whether GAC must provide uranium to I&M under the I&M-UNC Contract. The central issue as between GAC and UNC is whether under the agreement between them [to which I&M is not a party, upon which the rights of I&M are in no way dependent, and which has generated an array of issues having no connection with I&M] UNC must provide GAC with the uranium it needs to perform its obligations under the I&M-UNC Contract."

3. The pertinent authorities, which need not be retailed again, favor plaintiff. While the Tenth Circuit decision in *Federal Resources, supra,* squints favorably toward defendant, it is distinguishable. The court in that case was moved by a concern, *inter alia,* for the interests of the absent party. See 408 F.2d at 878. As defendant notes, no comparable concern arises here. In addition, the Tenth Circuit treated as significant the ready and suitable state forum in which the absent party could be conveniently joined. Id. at 877. Here, while defendant has referred to "one or more forums in New Mexico where under present circumstances the present controversy could more appropriately be litigated* * *," it failed to mention that it has actually been resisting the assertion of jurisdiction over it in New Mexico. In such a context, it is not appealing to assure plaintiff that the instant case, "could more appropriately be litigated" in New Mexico.

5. Defendant's desire for unitary adjudication could be realized by defendant's taking the initiative and bringing an action against UNC and I&M in a New Mexico court where

jurisdiction over all the parties could be obtained. Absent such an initiative by movant, the court is not disposed to dismiss plaintiff's case and force it to try to litigate in a forum not of its own chosing [sic].

In all the circumstances, the court concludes that "in equity and good conscience the action should proceed", Rule 19(b), between the present parties. The motion to dismiss is denied.

It is so ordered.

Dated: New York, New York
September 9, 1976

/s/ MARVIN E. FRANKEL
U. S. D. J.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-76-173

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Plaintiff,

—*vs*—

DUKE POWER COMPANY, a corporation,

Defendant.

ORDER

General Atomic Company, plaintiff, is a partnership composed of Gulf Oil Corporation, an oil company, and Scallop Nuclear, Inc. It styles itself on its stationery as "A Gulf and Royal Dutch Shell Company." General Atomic brought this action to obtain a declaration of rights under its November 7, 1973, contract by which it agreed to supply uranium to the defendant, Duke Power Company; it also moved for a stay of arbitration pending the conclusion of this action. Duke moved for a stay of this action pending arbitration. A hearing was conducted on Friday, August 13, 1976, on pending matters.

Duke, like other electric power companies, generates electric power, in part from the energy of falling water, but in the main by steam turbines. Most of the heat to produce the steam that turns the turbines comes from coal, but in recent years some of the heat is generated by nuclear reaction. Uranium, in one or more of its forms, is a fuel now us
some plants to generate such heat.

United Nuclear Corporation was a producer of uranium.

In 1970, United Nuclear made a contract with Duke Power Company to supply Duke with about six million pounds of uranium fuel in the years from 1971 to 1985, at prices to be computed on a somewhat sliding scale, but essentially in the neighborhood of $8.00 to $10.00 per pound. Deliveries were made under that agreement.

In June, 1971, Gulf and United Nuclear formed a new corporation, Gulf United Nuclear Fuels Corporation (GUNF). Gulf owned 57% and United Nuclear owned 43% of the GUNF stock. United Nuclear assigned the Duke uranium supply contract to GUNF, and Duke consented to the assignment only on condition that both Gulf Oil Corporation and United Nuclear guarantee that GUNF would perform its contract obligations. They did so guarantee.

In September, 1973, Gulf Oil broke up its joint venture with United Nuclear, bought out United Nuclear's interest in GUNF, and made a contract with United Nuclear (dated June 30, 1973) to purchase uranium from United Nuclear.

In November, 1973, Duke entered into the contract with GUNF for the purchase of uranium fuel out of which this dispute arises; this contract replaced the original 1970 contract with United Nuclear.

Immediately thereafter, Gulf Oil merged GUNF into Gulf as a division of Gulf and on January 1, 1974, assigned the Duke contract to General Atomic Company, the "Gulf Oil and Royal Dutch Shell Company" which is the plaintiff in this suit.

The contract contains an arbitration agreement apparently enforceable under North Carolina law and enforceable in this court.

United Nuclear Corporation was left with no direct duties to Duke, though it had been required by Duke to guarantee,

and did guarantee, the obligations of General Atomic and Gulf to Duke under the uranium supply contract.

General Atomic Company made deliveries until the end of 1975, but on December 30, 1975, it defaulted and failed to deliver 325,000 pounds of uranium.

General Atomic contends that it is excused from performance of its agreement with Duke because (and to the extent that) United Nuclear Corporation has failed or may fail to deliver fuel to General Atomic.

Apparently the open market price has gone up from $8.00 or $9.00 a pound to $39.00 or $40.00 a pound. Duke has incurred losses already estimated at about $11,500,000.00 because it has already had to buy on the open market 325,000 pounds of uranium fuel at approximately $39.00 a pound which plaintiff had contracted to deliver for $9.00 a pound.

Duke's losses will amount to about $180,000,000 if plaintiff succeeds in its contentions and if the price of uranium remains at its present level.

Plaintiff claims that the arbitration agreement is not enforceable and that arbitration has not been properly requested. Plaintiff claims that it should be excused from performance because it contends that it was contemplated that United Nuclear Corporation would be the sole source of supply for its deliveries. It also suggests, if arbitration is to be allowed, that United Nuclear Corporation be made a party to the arbitration.

I find the arbitration agreement to be enforceable; and the defects in the call for arbitration to date, if any exist, are remediable.

Since both parties are seeking equitable relief, some minimal attention should be given to their probable chances of success on the merits.

General Atomic's claim that its deliveries of uranium were

to be made only from fuel supplied by United Nuclear Corporation does not appear to be supported by the present record.

No portion of the contract supporting that claim has been called to the attention of the court.

In fact, the contract (Article XXX-D.) seems to point expressly in the opposite direction:

> "D. *Gulf United may enter into subcontracts and purchase agreements with others in the performance of this Agreement.* No contractual or employer-employee relationship between Purchaser and any such Gulf United subcontractor shall be created by virtue of this Agreement." (Emphasis added.)

The plaintiff's essential contract is (page 1) to *"supply"* fuel assemblies. In the face of the express provisions of Article XXX, and in the absence of contract provisions limiting plaintiff's sources to the original contracting supplier, United Nuclear Corporation, it would appear that the plaintiff has an uphill battle to persuade a trier of fact that it should be excused from performance simply because United Nuclear, one source of supply, has stopped making deliveries. Unless such persuasive evidence is developed, it appears that Gulf, a big operator in oil, has speculated big and lost big in uranium.

Such considerations are for the arbitrator and are relevant here only as they bear upon decision of the equitable questions before the court.

As to the request for a delay because United Nuclear Corporation is not a party defendant, two points should be noted:

> (a) United Nuclear, as a guarantor only of the 1973 contract in suit, would not be an improper party, but it is certainly not a necessary party to a determination of the rights of General Atomic and Duke under the arbitration agreement.

(b) A state court in New Mexico has entered an order, binding upon General Atomic, the plaintiff herein, enjoining plaintiff from litigating in any other court, or arbitrating, its claims against United Nuclear pending decision by the New Mexico state court. Despite that court order, General Atomic suggests that the court should bring United Nuclear into the arbitration proceedings on its own motion, and in any event should not permit arbitration of Duke's claim until United Nuclear has been brought into the arbitration proceedings. The one would be a violation of the letter and the other the spirit of the New Mexico court order. Moreover, I am unwilling to accept the suggestion that the New Mexico courts will not give General Atomic a fair hearing because United Nuclear, apparently a publicly held corporation, digs uranium in New Mexico. This court must and will proceed upon the premise that the New Mexico court will decide the case on its merits without regard to where the uranium is dug.

IT IS THEREFORE ORDERED:

1. That the plaintiff's motion to stay arbitration is denied.

2. That defendant's motion to stay this action and all proceedings herein until an arbitration shall have been had in accordance with the terms of the Agreement between the parties is allowed.

This 9 day of September, 1976.

/s/ JAMES B. MCMILLAN

James B. McMillan
United States District Judge